Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

PHILLIS ROBINSON BRANCH,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LENNOX S. HINDS
Counsel of Record
AARON DAVID FRISHBERG
STEVENS, HINDS & WHITE, PC
Attorneys for Petitioner
116 W. 111th Street
New York, NY 10026
(212) 864-4445

180594

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

32 pp

QUESTIONS PRESENTED

Whether Petitioner, seeking to show disparate treatment in an employment discrimination case, should have been required to support of a *prima facie* claim of discrimination by overcoming her employer's asserted distinctions between her and the employees she identified as comparators who had been treated more favorably.

Whether, for the purpose of summary judgment, the Respondent's claims that the decision-maker whom Petitioner asserted was responsible for her discriminatory termination lacked confidence in Petitioner should have been given weight as evidence of a non-discriminatory motive for the termination.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated March 7, 2001, Appendix B, is not reported.

The Summary Order of the United States Court of Appeals for the Second Circuit, dated May 14, 2002, Appendix A, is also not reported.

STATEMENT OF JURISDICTION

The order denying Petitioner's petition for rehearing or rehearing en banc was entered on January 31, 2003. (Appendix C). Jurisdiction is statutorily conferred upon this Court to review on certiorari the Summary Order of the Court of Appeals by 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The relevant portion of 42 U.S.C. § 2000e-2 is as follows:

> Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Petitioner brought suit for employment discrimination following the termination of her employment, asserting that she her race (black). The court found that Petitioner had established a *prima facie* case under the McDonnell Douglas framework, in that her employment had been terminated, while a light-skinned Hispanic female had been given her position. However, Petitioner sought to establish, in support of her assertion that she had been discriminated against on the basis of her race, that the employer's explanations were a pretext for discrimination, that the decision-maker, the head of her department, had subjected her to disparate treatment on the basis of her race prior to her being laid off.

Petitioner was one of only two employees in her department whose position was essentially clerical and administrative, rather than technical or managerial. The District Court decision declined to give any weight to Petitioner's assertions that she had been treated less favorably than other employees in her department who had been recognized or rewarded for their significant contributions to the department's work, on the basis that these employees were in more responsible, executive positions, and that their contributions were of a different nature than Petitioner's. (Appendix B, at 13a). The District Court also accepted the employer's contention that Petitioner's claim that she was not treated with professional courtesy by the department head, as were other employees in her department, did not contribute to her claim because she was not similarly situated to these executive employees, expressed by the department head as Petitioner not being "one of the boys." (Appendix B, at 12a to14a).

Finally, the District Court found that Plaintiff had not sufficiently raised an issue of discrimination to survive a motion for summary judgment, in part because the department head had misgivings about her while he was confident in the performance of the Hispanic female who took over her job duties.

Petitioner submits that the District Court decision, which was substantially adopted by the Court of Appeals, erroneously narrowed the group of persons "similarly situated" with respect to discriminatory treatment to a point where it would be impossible for Petitioner or any Plaintiff who was discriminated against, who was uniquely or nearly uniquely situated with regard to job duties in a department of an employer to prove a claim of discriminatory treatment.

The District Court had subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1331, federal question jurisdiction, and pursuant to 28 U.S.C. § 1343, to enforce civil rights secured by federal law.

REASONS FOR GRANTING THE PETITION

Petitioner submits that there is a division between this circuit and other circuit courts in the holding of the United States Court of Appeals for the Second Circuit in this and other cases addressing the issue of when a Plaintiff in an employment discrimination is similarly situated to other employees, for the purpose of showing discrimination under the McDonnell Douglas framework, and whether a Plaintiff should be required to establish this as part of the *prima facie* case, or at the stage of showing that the employer's assertions of non-discriminatory reasons are pretextual. Moreover, this question is not only an important one for the proper enforcement of employment discrimination laws, but is not one on which there is harmony among the lower courts, as shown by the significant splits among the circuits, and by the frequency of the overturning of district court decisions by the circuit courts of appeals.

Thus, the Second Circuit has treated the question of whether a plaintiff employee who is a member of a protected group is similarly situated to a comparator employee who is not a member of the protected group is part of the Plaintiff's *prima facie* case. *McGuiness v. Lincoln Hall*, 263 F.3d 49 (2d Cir. 1999). The same approach is taken by the Sixth Circuit, (*see Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), *Clayton v. Meijer*, (6th Cir. 2002), the Seventh Circuit (*see Stockett v. Muncie, Indiana Transit System*, 221 F.3d 997 (7th Cir. 2000), the Ninth Circuit

(*see Chuang v. University of California at Davis*, 225 F.3d 1115 (9th Cir. 2000), and the Eleventh Circuit (*see Lathem v. Department of Youth and Community Services*, 172 F.3d 786 (11th Cir. 1999). To the same effect is *Barbour v. Browner*, 181 F.3d 1342 (D.C. Cir. 1999), in which the District of Columbia Circuit held that the District Court should have dismissed the Plaintiff's case as a matter of law, and that she had not established her comparability to the employee she claimed had been more favorably treated.

On the other hand, the First Circuit Court of Appeals held, in *Conward v. Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), that the District Court had erred in evaluating the Plaintiff's comparability with other employees as part of his *prima facie* case, and that this comparison should have been considered as part of his proof that the employer's explanations were pretextual. In the same vein is *Lynn v. Deaconess Medical Center*, 160 F.3d 884 (8th Cir. 1998), evaluating the Plaintiff's claim that other employees who were disciplined less severely than him at the pretest stage. In *Ortiz v. Norton*, 254 F.3d 689 (10th Cir. 1999), the Tenth Circuit criticized the requirement that the Plaintiff establish his comparability to other employees as part of his *prima facie* case as preventing a Plaintiff from rebutting the pretextual nature of the employer's distinctions.

Of the former group, *Stockett v. Muncie, Indiana Transit System*, *supra*, 221 F.3d 997 particularly well illustrates the distinction. In that case, the employee Plaintiff protested his disparate treatment in being discharged after suspicion of drug use led to his being tested. The Court of Appeals held that he was treated exactly the same as another employee who was not required to take a test after suspicions arose of his using drugs, because they were both observed by

supervisors, and only the black employee's condition gave rise to probable cause to believe that he might be using drugs. This is but another way of stating that the two employees were not comparably situated with respect to the manner in which they were indisputably treated differently, being required to take the drug test.

There is an enormous difference between an approach which would treat this employee's *prima facie* case as showing that the other employee's condition was equally susceptible to giving rise to probable cause, and one which permits the employee to show from the totality of circumstances that the employer's determination that only he should be tested was based on a bias, rather than a factually supportable difference in the observable evidence of drug use.

When the Stockett approach is embraced, as it was by the District Court in the case at bar, in holding that there was a difference between the two employees because the supervisor had more confidence in one, the barrier to proving a discriminatory decision-making process may become insurmountable.

When the employer's decision-maker's subjective evaluation is given credence as evidence of a nondiscriminatory motive, without requiring the employer to articulate some verifiable criteria for its subjective evaluation, even the weighing of evidence at the pretext stage is skewed in the employer's direction, since what would otherwise be evidence of bias is discounted by an evaluation which may itself be tainted, but which may never be allowed to be tested by a jury.

Not only has there been a significant fissure among the circuit courts, even with respect to the question of at what stage of the proceeding comparability arises. The frequency of reversal of district court opinions strongly suggests that the lower courts are in need of additional guidelines to address the issues of comparability. *See, e.g., Barbour v. Browner, supra*; *McGuiness v. Lincoln Hall, supra*; *Ercegovich, supra*; *Lynn v. Deaconess Medical Center*; *Chuang v. University of California at Davis, supra*; *Ortiz v. Norton, supra*; *Lathem v. Department of Youth and Community Services, supra.*

Beyond the question of whether comparability should be considered at the first or third stage, there is a telling difference between those circuits which have placed greater emphasis on the plight of the individual who may need to reach outside their immediate job category to show that others are better treated with respect to the same employer policy, *e.g., Ercegovich, supra, Lathem v. Department of Youth and Community Services, supra*, and especially, *Ortiz v. Norton, supra*, and those circuits in which the bar to showing similarity appears to be set higher. *See, e.g., Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999), (probationary employee can not show similarly situated either to other probationary employees who were permitted to continue in training after disciplinary infractions, or to permanent employee who was suspended for ten days and transferred for like offense).

Petitioner respectfully submits that there are well-founded concerns, expressed by the Court of Appeals for the Tenth Circuit, in *Ortiz v. Norton*, 254 F.3d 689, *supra*, and by the Sixth Circuit Court of Appeals in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, *supra*, that requiring a plaintiff to identify an identically matched person

not in the protected group to establish proof of discrimination. While there is a near universal agreement in the circuits on the formula that similarly situated means only that the comparator be similarly situated in all relevant respects, this seeming agreement presents a tautological statement, and masks important differences among the circuits as to how much leeway is to be permitted a plaintiff in proving a *prima facie* case and in showing pretext.

CONCLUSION

This Court should grant the within petition for certiorari to resolve a division among the circuits on an important question of employment discrimination law, the appropriate use of comparators in Plaintiffs meeting their burden of proof.

Respectfully submitted,

LENNOX S. HINDS
Counsel of Record
AARON DAVID FRISHBERG
STEVENS, HINDS & WHITE, PC
Attorneys for Petitioner
116 W. 111th Street
New York, NY 10026
(212) 864-4445

APPENDIX A — SUMMARY ORDER OF THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 14, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-7398

PHILLIS ROBINSON BRANCH,

Plaintiff-Appellant,

- v. -

SONY MUSIC ENTERTAINMENT, INC.,

Defendant-Appellee.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of May two thousand two.

Present: HONORABLE WILFRED FEINBERG,

HONORABLE AMALYA L. KEARSE,

HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by counsel.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Griesa's Opinion dated March 7, 2001. Defendant came forward with evidence of legitimate, non-discriminatory reasons for its employment decisions, and plaintiff failed to adduce evidence from which a rational finder of fact could infer that those reasons were pretext for racial discrimination.

We have considered all of plaintiff's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk
by: s/ Lucille Carr

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 7, 2001 AND RECEIVED MARCH 8, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 9238 (TPG)

PHILLIS ROBINSON BRANCH,

Plaintiff,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Defendant.

OPINION

Plaintiff, Phillis Robinson Branch, sues her former employer, Sony Music Entertainment, Inc., for violation of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e *et seq.* Plaintiff, who is African-American, claims that she was terminated from her position as an executive secretary on account of her race. Defendant denies this claim and argues that plaintiff's termination was part of a larger reorganization motivated by budget constraints.

Defendant moves for summary judgment dismissing the claim. The motion is granted.

Appendix B

Facts

Plaintiff, an African-American woman, was employed by CBS Records, Inc. beginning in May of 1990. In about January of 1991 CBS Records was acquired by defendant Sony Music, Inc. During plaintiff's employment with CBS/ Sony, she worked as a secretary in the Management Information Services (MIS) department, under several different supervisors. In about October of 1994 plaintiff was assigned to work for Vice President Rick Schwartz, who supervised plaintiff's department.

Between 1994 and early 1996 Sony underwent a budget-driven reorganization in plaintiff's area, resulting in many layoffs. During this time, upper management instructed Schwartz to combine into a single position the positions held by plaintiff and two other employees, Carmen Bonet and Esther Martinez. Martinez, a former manager who is Hispanic, was selected to fill the new combined position. Martinez was more senior than plaintiff and Bonet, and had the unequivocal endorsement of her supervisors. On January 24, 1996, Schwartz informed plaintiff that her position was being eliminated.

Plaintiff does not dispute Martinez's seniority or qualifications, but claims that the selection of Martinez was racially motivated. Plaintiff notes that Martinez is a light-skinned Hispanic. She also states that, although Sony's reorganization was intended to save money, Martinez's post-reorganization salary was $7,000 higher than plaintiff's had been. She adds that the additional duties taken on by Martinez as a result of combining the positions did not justify the higher salary.

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Plaintiff was offered a termination agreement that would have characterized her layoff as a "voluntary resignation," effective March 29, 1996. Plaintiff was offered the option of working in an internal temp pool while she looked for other employment within Sony and elsewhere. Plaintiff refused to sign the termination agreement. This apparently made her ineligible for assignment to the temp pool. She was then asked to leave immediately. Defendant asserts that plaintiff was asked to leave immediately because she was in a position of confidence with access to Schwartz's personal e-mail and files.

Bonet was offered termination on the same terms as plaintiff. Unlike plaintiff, Bonet signed the termination agreement and accepted employment in the temp pool. She subsequently found other employment at Sony.

In addition to Bonet, at least two other Sony employees, Richard Gricus and Susan Richards, had their positions terminated on the same day plaintiff was asked to leave. Gricus is Caucasian and was an executive at Sony. Richards is also Caucasian and was a manager at Sony. Gricus and Richards were offered the termination agreement, which both signed. Because of their positions, instead of being offered work in the temp pool, they were offered the opportunity to stay through the end of March to provide transition assistance.

On February 13, 1996 plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC). The charge alleged that plaintiff's termination was racially discriminatory, and that she had been subject to discriminatory treatment by Schwartz during her

employment. On September 30, 1997 the EEOC issued plaintiff a "right to sue" letter. Plaintiff filed her complaint in this action on June 29, 1998 alleging racially discriminatory termination.

A question exists as to whether plaintiff's job performance was satisfactory during her employment. Plaintiff states that her Employment Performance Reviews consistently rated her between "competent" and "above expectations." She also notes that she received regular salary increases, on both merit and "marketplace adjustment" bases. Schwartz, however, claims that plaintiff had punctuality problems, made too many personal phone calls, was careless about keeping notes in the calendar and taking phone messages, and didn't review his e-mail in a timely fashion. Plaintiff contests these allegations.

Plaintiff states that other African-American employees were treated differently than white employees in her department. She states that on one occasion, Schwartz refused to approve the time sheets of Tom Wiggins, an African-American consultant in the department. Plaintiff claims that Schwartz did this to make Wiggins' working conditions difficult. She also states that, by the end of March 1996, the department had terminated all its African-American employees.

Discussion

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c). The burden is on the moving party to demonstrate that no genuine issue of material fact exists. *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). All ambiguities must be resolved and all inferences must be drawn in favor of the non-moving party. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985). When no rational jury could find in favor of the non-moving party because the evidence to support its case is so slight, there is no issue of material fact and a grant of summary judgment is proper. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988). A litigant may not defeat a motion for summary judgment solely through "unsupported assertions" or conjecture. *Goenaga v. March of Dimes Birth Defects Fund*, 51 F.3d 14, 18 (2d Cir. 1995).

A court must be especially cautious about granting summary judgment in a discrimination case in which the employer's intent is at issue. *Gallo v. Prudential Residential Services, L.P.*, 22 F.3d 1219, 1224 (2d Cir. 1994). "Because writings supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Id.*

Courts apply a three-stage test when evaluating race discrimination claims such as plaintiff's. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden

shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's discharge. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimintion. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Prima Facie Case

To establish a prima facie case of termination based on discrimination, plaintiff must show: (1) that she belonged to a protected class; (2) that her job performance was satisfactory; (3) that she was discharged; and (4) her discharge occurred under circumstances giving rise to an inference of discrimination on the basis of her membership in the protected class. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). The plaintiff's burden at the prima facie stage is *de minimis. Id.*

Plaintiff has unquestionably established the first and third elements of the prima facie case of discriminatory discharge. It is undisputed that plaintiff is African-American, and therefore a member of a protected class. It is also undisputed that plaintiff was discharged from her employment.

A question exists regarding whether plaintiff performed her job satisfactorily. In evaluating a plaintiff's job performance, the ultimate inquiry is whether her performance met her employer's legitimate expectations. *Meiri v. Dacon*,

759 F.2d 989, 995 (2d Cir. 1985). This will often be resolved through examination of the employer's evaluations of the plaintiff. *Knight v. Nassau County Civil Serv. Comm.*, 649 F.2d 157, 162 (2d Cir. 1981). At the time he informed plaintiff that she was being laid off, Schwartz told plaintiff that her work was good. Her personnel file is devoid of evidence of poor job performance. Plaintiff's periodic performance reviews were consistently satisfactory. Although defendant now asserts that plaintiff did not perform her work satisfactorily in certain respects, the Court will resolve the conflicts in favor of the plaintiff on this motion for summary judgment.

Finally, plaintiff must show that her termination occurred under circumstances that give rise to an inference of racism. Plaintiff urges the Court to infer racism from the following factual allegations: (1) plaintiff was the only one of the four employees laid off on January 24, 1996 who was asked to leave the premises immediately; (2) plaintiff's position was filled by a light-skinned Hispanic woman; (3) by the end of March 1996, plaintiff's department had terminated all of its African-American employees. Plaintiff also asks the Court to consider the allegedly discriminatory conduct that plaintiff endured on the job. Although the significance of these allegations is far from settled, it will be assumed for the purpose of this motion that they are enough to raise an inference of discrimination under the *de minimis* standard applied in discrimination cases.

Employer's Explanation

Once the plaintiff has established a prima facie case of discriminatory termination, the burden falls upon the

employer to produce evidence that the employee was terminated for a legitimate, non-discriminatory reason. *Burdine*, 450 U.S. at 254. The employer's explanation at this stage should be clear and specific enough to frame the factual issues with sufficient clarity to afford the employee a fair opportunity to demonstrate pretext. *Meiri*, 759 F.2d at 997-98.

A variety of conditions having nothing to do with the characteristics of the affected employees can force an employer into layoffs. In this case, budget constraints were responsible. Defendant argues that plaintiff was terminated as part of an ongoing reorganization of the MIS department in an effort to cut costs. Schwartz was directed by higher management to combine plaintiff's position with the other two positions. Defendant was forced by its budget difficulties to lay off a large number of employees, and these layoffs affected employees of all races. This effort to reduce costs was certainly a legitimate, non-discriminatory reason for terminating plaintiff.

Defendant also presents a legitimate, nondiscriminatory reason for choosing Martinez over plaintiff to fill the new combined position. Of the three employees whose positions were affected by this combination, Martinez was the most senior. Defendant is certainly entitled to consider seniority in its employment practices. Defendant also argues that Martinez had the unqualified endorsements of her supervisors, while Schwartz apparently had reservations about plaintiff's performance. These are also legitimate considerations of an employer in making employment decisions.

Plaintiff asserts that even after her pay cut, Martinez's salary was still $7,000 higher than plaintiff's. Plaintiff argues that if the layoffs were a sincere effort to cut costs, defendant should have taken the most cost-effective approach and chosen plaintiff to fill the new position because her salary was lower than Martinez's. This argument is without merit. Defendant is not required to ignore applicants' other qualifications merely because it is trying to save money. That defendant retained a particular person at a certain salary does not gainsay its contention that it was acting overall to save money. Indeed, the savings realized from the combination of the three positions was over $60,000 annually.

Pretext

Once the employer has met its burden of providing a legitimate, non-discriminatory reason for plaintiff's discharge, the plaintiff has an opportunity to show that the stated reasons were merely a pretext for discrimination. An employee may satisfy this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Plaintiff has not satisfied this Court that defendant's stated reasons for terminating her were pretextual. Much of plaintiff's argument that she was discriminated against is

based on her allegations of differential treatment. Plaintiff argues that she was treated differently from other employees in (1) the circumstances of her termination; (2) the treatment of her leave requests; (3) the dispensation of bonuses.

On the day of her termination, plaintiff was asked to leave the premises. Three other terminated employees were all allowed to stay at Sony, in some capacity or other, for a longer period of time. Plaintiff states that this is evidence of discrimination against her based on her race. The Court does not agree. Two of these, Gricus and Richards, were management level employees. Gricus and Richards signed the termination agreement and were asked to stay through March in order to transfer the more substantial duties of these executive-level employees to others. Bonet was an executive secretary like plaintiff. Bonet signed the termination agreement and accepted employment within the temp pool. The different treatment of these three employees had nothing to do with racial discrimination.

Plaintiff alleges that Schwartz treated her requests for leave time differently from the requests of other employees. She states that he questioned her extensively when she asked for time off, but he accepted simple e-mail notifications from other employees. Plaintiff stated that the following employees were permitted to notify Schwartz of time off via e-mail: William Marengo, an associate director, Mark Rheiner, a director, Susan Richards, a manager, and Doreen Moller, a manager. In any event, prior to the e-mail messages these employees had scheduled their time off with Schwartz at executive staff meetings. The e-mail messages were merely reminders to Schwartz about pre-arranged vacation days.

Appendix B

There is no merit in the claim that this e-mail procedure indicated racial discrimination against plaintiff.

Finally, plaintiff alleges that Schwartz did not give her a bonus for her work on a presentation. Plaintiff was involved in the planning and organization of a multi-media presentation that Schwartz gave in Geneva in 1995, that was a great success. Plaintiff expressed interest in receiving some recognition of her contributions, either in the form of a bonus or otherwise, but Schwartz declined to render any. Plaintiff and defendant disagree as to whether plaintiff's contributions to the presentation actually merited a bonus or any additional recognition. This Court is not in a position to determine the importance of plaintiff's contributions. However, even assuming that plaintiff made substantial contributions to the presentation, plaintiff's claim that she did not receive a bonus is not evidence of discrimination. Plaintiff points to two other employees, Rosemary Everett and Brady Scheiss, whom she believes received bonuses for their accomplishments. These two employees are not similarly situated to plaintiff in at least two regards: (1) they are both executive level employees, and (2) their accomplishments were of a different nature from those of plaintiff. In any event, these employees did not receive bonuses, although one was recommended for a bonus and the other was promoted sometime later. Plaintiff has not produced evidence that she was treated differently from other employees because of race.

Plaintiff makes several arguments in support of her claim that are not based on differential treatment. She claims that Schwartz did not follow company procedure regarding her performance review, that Schwartz said that she was not

"one of the boys," that she was stripped of any non-secretarial duties when she came to work for Schwartz, that Schwartz told her that she played her gospel music too loud, and that by the end of March 1996 her department was devoid of African-American employees. Of these, only the last raises even a question of discrimination.

A racial imbalance in the makeup of a workplace is insufficient, by itself, to demonstrate discrimination. It is unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 489 (1986) (O'Connor, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988).

In some circumstances, a plaintiff may use statistical evidence regarding an employer's practices to rebut an employer's purported legitimate non-discriminatory explanation for adverse employment action. However, the Supreme Court has outlined limitations on the use of racial statistics. First, plaintiffs are required to identify a specific employment practice, rather than rely on bottom line numbers in an employer's workforce. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). Plaintiffs must then present statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.*

Appendix B

Plaintiff has done no more than state that there are no longer any African-American employees in her department. She has not identified any specific employment practice that resulted in this situation. Moreover, this evidence is certainly not statistical evidence sufficient to show that African-Americans have been excluded based on race. Plaintiff does not state how many employees the department has. She has not performed an analysis of the imbalance, much less provided any evidence of its statistical significance. Therefore, plaintiff is incorrect in her assertion that the absence of African-Americans in her former department is evidence of discrimination.

Conclusion

Defendant has demonstrated that racial discrimination was not a factor in plaintiff's termination. There is no triable issue of fact.

Defendant's motion for summary judgment is granted and the action is dismissed.

SO ORDERED.

Dated: New York, New York

March 7, 2001

s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 31, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 01-7398

PHILLIS ROBINSON BRANCH,

Plaintiff-Appellant,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Defendant-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st Day of January, two thousand three.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellant, Phillis Robinson Branch.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED**.

Appendix C

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/ Arthur Heller
Arthur Heller,
Administrative Attorney

No. 02-1617

IN THE

Supreme Court of the United States

PHILLIS ROBINSON BRANCH,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ROBERT I. GOSSEEN
Counsel of Record
GALLAGHER GOSSEEN FALLER
& CROWLEY
Attorneys for Respondent
1010 Franklin Avenue (Suite 400)
Garden City, New York 11530
(516) 742-2500 or (212) 947-5800

181631

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sony Music Entertainment, Inc, has a corporate parent, Sony Corporation, the shares of which are only traded in the United States through American Depository Receipts listed on the New York Stock Exchange, and no publicly held company owns 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

The question presented by Petitioner is whether the Second Circuit's ruling in this case comports with the respective burdens of proof under this Court's well-established standards for the evaluation of the *prima facie* case in an employment discrimination case.

Respondent submits that the Second Circuit's ruling is consistent with this Court's standards, illuminates no glaring split among the circuits, raises no novel issues of law and is proper in all respects. Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

THERE IS NO SERIOUS DIVISION AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW

I.

THE TRIAL COURT'S EXAMINATION OF PETITIONER'S PROFFERED *PRIMA FACIE* CASE

For purposes of evaluating whether summary judgment was appropriate the trial court chose both to "resolve the conflicts [regarding plaintiff's work performance] in favor of plaintiff" [ ] for the purpose of . . . [the] motion that [plaintiff's allegations of discriminatory conduct on the job] . . . [were] enough to raise an inference of discrimination under the *de minimis* standard applied in discrimination cases." (Petition, Appendix B, 9a) Having done so, and consistent with this Court's burden shifting analysis, the district court examined whether the employer had produced evidence that plaintiff was terminated for a legitimate, non-discriminatory reason. *Texas Dept. of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The district court determined that the employer had done so and consequently that the burden shifted to Petitioner to show that her employer's stated reasons for laying her off were pretextual. (Petition, Appendix B, 11a)

The trial court held that Petitioner had not demonstrated that the employer's stated reasons for laying her off were in any wise pretextual. (Petition, Appendix B, 11a) Parenthetically, the court noted that "much of plaintiff's argument that she was discriminated against is based on her allegations . . . that she was treated differently from other employees. . . ." (Petition, Appendix B, 11a-12a)

II.

PETITIONER'S ERRONEOUS ASSERTION THAT THERE IS A "FISSURE" AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW AND HARMONIZATION

Petitioner asserts that there is a "significant fissure" among the circuits "in this and other cases addressing the issue of when a Plaintiff in employment discrimination [case] is similarly situated to other employees, for the purpose of showing discrimination under the McDonnell Douglas framework. . . ." as well as a "lack of harmony among the lower courts" on the ancillary issue of "whether a Plaintiff should be required to establish this [comparability] as part of the *prima facie* case, or at the stage of showing that the employer's assertions of non-discriminatory reasons are pretextual." (Petition 4) Petitioner avers that these issues are important "for the proper enforcement of employment discrimination laws. . . ." (*id.*) and thus require the Supreme

Court to harmonize divergent circuit court standards and to issue guidance to the district courts. Respondent respectfully disagrees.

III.

THE MAINSTREAM VIEW AMONG THE CIRCUITS

Ercegovich v. Goodyear Tire & Rubber Company, 154 F.3d 344 (6th Cir. 1998) well illustrates the mainstream view among the circuits of the appropriate place in the *prima facie* case for considering an alleged discriminatee's showing of comparability. There, the Sixth Circuit stated in relevant part that

> [w]here the employer eliminates an employee's position pursuant to a reduction in force or a reorganization, the employee establishes a prima facie case of . . . discrimination when he or she shows [the first three prongs of the *McDonnell Douglas v. Green* analytical framework] and (4) additional direct, circumstantial, or statistical evidence tending to show that the employer singled out plaintiff for discharge for impermissible reasons. A plaintiff satisfies the fourth prong where he or she demonstrates that a comparable non-protected person was treated better.

Id. at 350 (Internal citations and quotation marks omitted).

IV.

PETITIONER'S ASSERTION THAT THERE IS A SERIOUS CONFLICT AMONG THE CIRCUITS FINDS NO SUPPORT IN PETITIONER'S CITED CASES

Contrary to Petitioner's assertion, *Lynn v. Deaconess Medical Center*, 160 F.3d 484 (6th Cir. 1998), does not depart from the prevailing view among the circuits. There, unlike this case, the employer conceded that plaintiff had established a *prima facie* case of discrimination (*id.* at 487), but argued that plaintiff had failed to produce sufficient evidence to meet his burden of establishing pretext. As the *prima facie* case was conceded, relieving plaintiff of his burden to adduce evidence of disparate treatment to show that his discharge was likely motivated by animus, plaintiff offered evidence of his disparate treatment not to make his *prima facie* case, but at the next evidentiary level, to meet his burden of establishing pretext.

Petitioner reads *Ortiz v. Norton,* 254 F.3d 889 (10th Cir. 2001) out of context serious to illustrate a "fissure" among the circuit courts where none exists. There, the circuit court's criticism of the trial judge's requirement that plaintiff establish his comparability with other employees at the *prima facie* case stage was based not on its belief in any inherent inequity of that approach, but rather upon the judge's erring definition of the term "similarly situated," which in the circumstances of that case incorrectly elevated plaintiff's *prima facie* evidentiary burden to an "onerous" level and thus acted to "cut off the plaintiff's opportunity to show that the proffered reasons for the adverse dismissal were pretext. . . ." *Id.* at 894

Petitioner's treatment of *Conward v. The Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), likewise fails to illustrate any glaring split among the circuit courts. True enough, the First Circuit agreed with plaintiff's premise that "the district court's sequencing determination was in error. . . ;" (*id.* At 19) its *decision,* however, affirmed the summary dismissal of plaintiff's case, noting that the court "need not dwell on this [sequencing] error," because the

> fatal weakness of appellant's position is that his evidence, *at whatever stage it is addressed*, does not raise a genuine issue of material fact as to the authenticity of the defendants' professed reason for dismissing him, nor does it raise such an issue concerning the allegation that racial animus underlay the action.

Id. at 20 (Emphasis supplied)

V.

THIS CASE RAISES NO ISSUE IMPORTANT TO THE PROPER ENFORCEMENT OF EMPLOYMENT DISCRIMINATION LAWS REQUIRING THIS COURT TO HARMONIZE DIVERGENT CIRCUIT COURT STANDARDS OR TO ISSUE GUIDANCE TO THE DISTRICT COURTS

There simply is no warrant for Petitioner's prediction of dire consequences for the enforcement of our Nation's employment discrimination laws if the Writ is not granted in this case. There is no significant conflict among the circuit courts and the reasoning in one decision that even *might* be considered to conflict (at least in *dictum)* with the dozens

upon dozens of cases consonant with this case, *Conward v. The Cambridge School Committee, supra*, appears not to have been followed or adopted by any court outside of the First Circuit.

Moreover, Respondent respectfully submits that even if, *arguendo,* this Honorable Court had any inclination to grant the Writ to fix a situation that is not broken, it is far too early in the day not to permit the development of evidentiary sequencing not to evolve on a case-by-case basis.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

ROBERT I. GOSSEEN
Counsel of Record
GALLAGHER GOSSEEN FALLER
& CROWLEY
Attorneys for Respondent
1010 Franklin Avenue (Suite 400)
Garden City, New York 11530
(516) 742-2500 or (212) 947-5800